BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	SPB Case No. 28211
ROBERT R. WATSON	**BOARD DECISION** (Precedential)
From dismissal from the position of Deputy Labor Commissioner II, with the Department of Industrial Relations	**NO. 94-10** March 8, 1994

Appearances: Dennis Moss, Attorney, Association of California State Attorneys and Administrative Law Judges for appellant, Robert R. Watson; Daniel E. Lungren, Attorney General, by Thomas A. Scheerer, Deputy Attorney General for respondent, Department of Industrial Relations.

Before Carpenter, President; Stoner, Vice President; Ward and Bos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Robert R. Watson (Appellant or Watson). Watson was dismissed from his position as a Deputy Labor Commissioner II, Department of Industrial Relations (Department) and appealed his dismissal.

Watson was charged with violations of Government Code section 19572, subdivisions (c) inefficiency, (d) inexcusable neglect of duty, (e) insubordination, (m) discourteous treatment of the public or other employees, (o) willful disobedience, and (t) other failure of good behavior. The charges were based primarily on appellant's conduct as a

hearing officer in 11 particular cases. The Department charges that appellant's conduct in these cases is illustrative of his overall performance as a hearing officer.

The ALJ who heard the appeal sustained the dismissal. The Board rejected the Proposed Decision, deciding to hear the case itself. After a review of the entire record, including the transcript, the exhibits (including numerous tape recordings of Watson's hearings), and the written and oral arguments presented by the parties, the Board sustains the dismissal for the reasons set forth below.

BACKGROUND

Watson has been employed by the state continuously since 1970, first as an Employment Security Officer and later as Unemployment Insurance Officer. He became an Industrial Welfare Agent on November 1, 1972 and a Deputy Labor Commissioner on June 1, 1976. Watson was promoted to Deputy Labor Commissioner II on July 1, 1977 and served in that capacity until his dismissal on June 21, 1990.

As Deputy Labor Commissioner II, Watson's duties included acting as a hearing officer for the Department of Industrial Relations on claims for wages and benefits. Watson conducted approximately 350-600 hearings per year.

In 1980 and 1981, Watson's supervisor prepared performance evaluations which asserted that Watson tended "to

dominate a hearing with his comments rather than allowing participants to prevail with the testimony." The evaluations indicated that during this period of time, Watson was receptive to comments and suggestions, and that his relationship with hearing participants improved. However, continued need for improvement was still indicated particularly in affording the participants the opportunity to readily express themselves during the course of the hearing.

On April 27, 1984, in response to complaints from both the claimant and defendant in a particular case, the Regional Manager, Carol Cole, criticized Watson for telling the defendant to "shut up and sit down," lecturing for 45 minutes and preventing the parties from presenting information concerning their case. Watson was informed of numerous complaints about "[l]ecturing or sermonizing . . . and rude and abrasive treatment of the public." Watson was instructed and he agreed to implement a number of changes in the manner in which he conducted hearings, including eliminating detailed explanations of the law and his responsibilities and refraining from giving irrelevant examples of problems. In addition, Watson was instructed to excuse himself briefly if he was in danger of losing his composure and shouting at the parties. Watson was advised that if the complaints concerning

his behavior continued, formal disciplinary action would be recommended.

On July 16, 1985, Watson received criticism in a written memorandum from the Regional Manager in regard to three hearings he had recently conducted. He was again criticized for giving lengthy lectures rather than listening; attempting to chastise and "put down" the parties in a loud haranguing voice; saying words to the effect that the way the claim was calculated didn't count; being rude and arrogant; and failing to permit the parties to talk or respond to questions. The memorandum asserted that Watson's lengthy diatribes during the hearings frequently caused him to schedule continuances in order to get the testimony of the parties. The memorandum stated that disciplinary action was being recommended.

On August 14, 1985, Watson met with his Regional Manager to further discuss the memorandum of July 16. At this meeting, Watson indicated that he had changed his style and was now permitting the parties to talk while he listened and he had reduced his explanations during the hearing process. The Regional Manager informed Watson that although adverse action was still being recommended, a lesser action than originally anticipated would be recommended because Watson was being so cooperative. Watson was informed that a follow up

meeting would occur on November 13, 1985. However, neither disciplinary action nor follow-up occurred.

Daniel Cornet, a Deputy Labor Commissioner III, was assigned to the Santa Barbara office on January 19, 1989. Over the course of 1989, Cornet gradually became aware of complaints about the way Watson handled hearings, many of which he shared with Watson. On October 23, 1989, Cornet called a meeting to discuss Watson's demeanor and work performance. Present at the meeting were Watson, his union representative, and Bob Smith, the Regional Manager. At this meeting, portions of the tape recordings of several of Watson's hearings were reviewed and discussed including Pizzi vs. Butson, Brockway vs. Guggia, and Abaurrea vs. Kinney.

The outcome of the meeting was reduced to writing and provided to Watson on November 3, 1989. The memorandum listed a number of cases, with specific legal errors identified. Watson was directed to cease verbal abuse of the public, allow parties to present their testimony, accept evidence or testimony which is germane to the issues, and keep continuances to a minimum. He was informed that the matter

was being submitted to headquarters with a recommendation for adverse action.[1]

On June 21, 1990, Watson was notified that the adverse action of dismissal was being taken against him. The specific instances of misconduct cited in the adverse action occurred in connection with cases heard by Watson both before the October 23, 1989 meeting and after that date.

ISSUES

This case presents the following issues for our determination:

a) Were each of the charges established by a preponderance of the evidence;

b) Assuming the charges are supported by the evidence, was progressive discipline followed;

c) Is the penalty of dismissal appropriate considering all the circumstance?

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[1]This memorandum included a number of incidents that were later used as the basis for the Department's adverse action. In Gary Blakeley (1993) SPB Dec. No. 93-20 p.6, the Board determined that ""[I]ncidents that form the basis for informal discipline imposed on the employee, cannot [later] be used as the basis for formal adverse action." In the present case, the memorandum was not itself informal discipline. The memorandum clearly stated that it was preliminary to formal discipline based on these incidents.

DISCUSSION

Specific Charges

Part A

Part A of the adverse action alleges that Watson was rude, abrasive, arrogant, badgering, and insulting to the public; subject to loud emotional outbursts; and chastised all parties appearing before him. In addition, the adverse action alleged that Watson inappropriately applied waiting time penalties and failed to follow other policies.

The testimony of claimants, defendants and attorneys from both sides, along with the tape recordings of a number of Watson's cases were submitted to support the charges.

Staub vs. Tritech Information Systems

On July 14, 1989, Watson conducted a hearing in Case No. 13-01458, Staub vs. Tritech Information Systems. In the Notice of Adverse Action, Watson was charged with badgering, intimidating and coercing Mr. Staub into accepting less than half of what he was entitled to from his employer. There was no tape recording available of this hearing. Mr. Staub testified, however, that, during the hearing, Watson yelled at him any time he attempted to present any of his documentary evidence or provide any testimony. Based on these facts, the ALJ found that Staub had been coerced into giving up his claim.

Although the evidence demonstrates that Staub sincerely believed that he had been pressured into accepting less than half his due, in its presentation to the ALJ the Department did not prove that Staub had, in fact, settled for less than half of what was due him. No evidence was presented as to the strength of Staub's claim. Nevertheless, the Department did prove that Staub felt he could not fairly present his case. Staub was intimidated into settling.

Watson's rude treatment of Staub demonstrates discourtesy to the public. Watson's failure to conduct a hearing that maintains the appearance of fairness constitutes "other failure of good behavior" within the meaning of § 19572 (t) in that it is unprofessional conduct which can not help but cause discredit to the appointing authority or the person's employment.

Abaurrea vs. Kinney Shoe Corp

On April 12 and June 28, 1989, Watson heard Case No. 13-1117, Abaurrea vs. Kinney Shoe Corp. The claimant represented himself and defendant was represented by an attorney. The Department alleged that Watson asked leading questions and denied the defendant an opportunity to respond to issues raised on cross examination.

A review of the tapes of this hearing indicates that Watson asked leading questions on issues that went to the

heart of the complaint. Watson also interfered with the defendant's case by lecturing both parties at length on various legal points. For example, near the end of the first day of hearings, during defendant's cross examination of the claimant, Watson lectured virtually non-stop for more than five minutes about possible ways that a person could be proven to be an exempt employee.

On the second day of hearing, Watson again lectured non-stop for almost ten minutes about defendant's burden. This was in response to the defense attorney's attempt to elicit from a witness a list of exempt functions performed by the claimant. In addition, Watson criticized the defense attorney for spending time on "minutia" and threatened to close the record if defendant's counsel did not present evidence in the specific manner described by Watson.

During the course of this hearing, more than three hours were spent on the examination and cross examination of one witness. Of that time, a significant percentage was spent by Watson lecturing the participants on various points of law. By wasting time with lecturing and then threatening to impose time constraints on defendant's counsel, Watson denied the defendant an opportunity to present his case.

Watson is also charged with improperly applying waiting time penalties pursuant to Labor Code Section 203. If a

defendant's failure to pay wages is deemed willful, a penalty of up to 30 days of the daily rate of pay may be awarded the claimant by the hearing officer. At the outset, we note that even if the Board were to find that Watson erred in his assessment of waiting time penalties, an improper assessment, by itself, would not constitute cause for discipline. The Department's apparent theory is that Watson knew that assessing this penalty was in error and he did it anyway and, thus, was willfully disobedient. Wilful disobedience requires a knowing and intentional violation of a direct command or prohibition. [Richard J. Hildreth (1993) SPB Dec. No. 93-22.] Thus, to prove this charge, the Department must not only prove that Watson erred in his assessment of waiting time penalties but that he did so wilfully.

Watson found the claimant to be a non-exempt working manager and awarded overtime and Section 203 penalties. Watson's supervisor, Daniel Cornet, testified that he believed that Watson erred in awarding Section 203 penalties because Cornet believed there to be a "bona fide dispute and . . . [consequently], the company had a valid belief that they were in compliance with the law." The Department presented no evidence to support Cornet's opinion.

James J. Piretti, defendant's counsel, testified that the employer, Kinney Shoe Corporation, had a good faith belief

that a credible legal dispute existed because it had won 10 previous challenges to the non-exempt status of similarly employed working managers. However, at the hearing before the ALJ, Mr. Piretti testified that he did not recall presenting evidence of the ten previous cases in this case nor does the tape recording of the hearing disclose that this evidence was presented.

Thus, on the evidence presented, the Board cannot determine that Watson erred in assessing a Section 203 penalty. Even assuming he did err, the Department did not prove Watson intentionally disregarded the law. The charge of improperly applying waiting time penalties is dismissed.

Watson's interference with defendant's presentation of his case does, however, constitute inefficiency and inexcusable neglect of duty -- inefficiency because Watson's longwinded lecturing wasted time that should have been devoted to establishing a record, and inexcusable neglect of duty because a hearing officer has a duty to insure that both sides are given the opportunity to establish an adequate record.

Pizzi vs. Butson Mobile Home Sales

Pizzi, Case number 13-1438, involved a dispute about commissions to be paid. The hearing was held before October 23, 1989. Both parties represented themselves. During the hearing, Watson was rude and abusive. For example, at one

point in the hearing, when the percentage and base of the commission was discussed, both parties informed Watson that their agreement was a 40/60 split on the gross commissions. Notwithstanding the apparent agreement of the parties, Watson continued to ask the same questions over and over, refusing to accept that such an agreement could have been made, thus implying that Butson, the employer, was inept for making the agreement.

When the parties were unable to explain the situation to Watson, Watson referred to himself as an idiot or dummy who had to have things spelled out very simply. At the hearing before the ALJ, Mr. Butson testified that although Watson was ostensibly referring to himself, he felt that Watson was implying that he (Butson) was an idiot or dummy. A review of the tape indicates that Mr. Butson had sound grounds for his surmise.

Watson is also charged with failing to award waiting time penalties although the defendant stipulated to owing the claimant unpaid commissions. At the hearing before the ALJ, Watson testified that he did not find the defendant's failure to pay to be willful because he (Watson) understood the defendant to have seen the unpaid commissions as part of the overall issue of commissions to be decided at the hearing.

The Department carried its burden of proving that Watson erred in failing to assess waiting time penalties. The Department has not, however, proven any element of willfulness or gross neglect sufficient to find either willful disobedience or inexcusable neglect of duty in Watson's failure to assess waiting time penalties. The charge of willful failure to assess waiting time penalties is dismissed. The Department proved by a preponderance of the evidence that Watson was rude and abusive and is, therefore, guilty of discourtesy.

Brockway vs. Milt Guggia Enterprises, Inc.

On May 10, 1989, while presiding over a hearing concerning claimant Brockway's status as an exempt employee, Watson intimidated and abused a witness, Beverly Heiberger. When defendant's attorney attempted to object to Watson's badgering of his witness, Watson shouted him down. At the hearing before the ALJ, Watson attempted to justify his conduct by explaining that the witness was not credible in her testimony.

Watson also interrupted testimony and prevented the parties from presenting their cases. The tape recording of this hearing demonstrates that the hearing was more of an inquisition than a fact finding process.

Watson was also charged with shouting the word "No" nine times and preventing the defense attorney from asking a question. The tape reveals that at one point in the hearing, Watson did, in fact, repeat the word "No" nine times in order to prevent the defense attorney from interrupting. Although Watson has the right to control the hearing, there was no call for him to be rude in the performance of his duties.

Watson was also charged with shouting "I could care less." Watson did state "I really don't care." When Watson stated "I really don't care," he was explaining, albeit rudely, that he was not, at that point, interested in the amount of time a witness spent on non-managerial functions. Instead, Watson wanted to explore the witness' understanding of non-managerial functions. Again, although Watson had the right to control the hearing, he did not have the right to do so in a rude and abusive manner.

Watson's rude behavior during this hearing constitutes discourtesy.

Saddler vs. Carpeteria

On September 18, 1989, Watson conducted a hearing in Case No. 13-01628, Saddler vs. Carpeteria. Mr. Saddler, the claimant at the hearing, testified that he was asked long involved questions by Watson and, when he attempted to explain his answer, was restricted by Watson to answering "yes" or

"no." The hearing lasted approximately an hour and a half. Saddler testified that, except for twenty minutes or so when Watson was out of the room to give the parties an opportunity to settle, Watson spoke for three quarters of the total time devoted to the hearing. Watson's explanations during the hearing were so long that time did not permit Saddler to present his documentary evidence. The ALJ who heard the testimony found Saddler to be a credible witness and accepted his testimony as fact.

Watson's conduct at this hearing constitutes inefficiency and inexcusable neglect of duty --inefficiency because long winded explanations are inappropriate at fact finding hearings such as those conducted by Watson and inexcusable neglect of duty because Watson failed to perform his duty as a hearing officer to take testimony. Hearing testimony is a hearing officer's main function.

Ward vs. Home Savings of America

Watson was charged with issuing an Order, Decision or Award of the Labor Commissioner in Case No. 13-00398, Ward vs. Home Savings of America, which was contrary to a legal opinion issued by the Department's Chief Counsel. Watson found the commission agreement to be invalid. The Chief Counsel's opinion approved of the type of commission agreement at issue in the hearing before Watson. Watson was also charged with

improperly applying waiting time penalties based on the fact that the Chief Counsel's legal opinion, approving the commission agreement, should have removed the element of wilfulness in the defendant's withholding of commissions.

The issue in Ward vs. Home Savings of America concerned the validity of a written policy of Home Savings of America. According to the policy, a loan agent earns commissions on loans once they are "committed." Even if a loan agent has performed all work necessary to earn the commission, if the loan agent voluntarily terminates or is terminated by the institution before the loan is committed, he does not earn the commission. Loans that are committed after the loan agent has terminated are reassigned to other loan agents who receive the commission.

Before the hearing was complete, but without informing either Watson or the opposing claimant, Home Saving's "outside" counsel, Karen Y. Teragawa of Epstein Becker Stromberg and Green, sought an advisory opinion on the policy in question from Lloyd Aubry, the Labor Commissioner. The request for an advisory opinion did not reference the pending litigation. Teragawa then spoke to H. Thomas Cadell, the Chief Counsel for the Division of Labor Standards Enforcement who advised her that, with some restrictions, the policy was not objectionable. Cadell reiterated the main points of their

conversation in writing on December 27, 1988 in a letter to Ms. Teragawa.

On January 3, 1989, after the hearing had closed, but before Watson finalized his decision, Home Savings sent Watson a copy of Cadell's letter and argued for a decision in their favor. The opposing party, Mr. Ward, had not been informed of either the request for an opinion on Home Saving's policy or of Home Saving's submission of this opinion to Watson.

In making his decision, Watson did not follow the opinion of the Chief Counsel. At the hearing before the ALJ, Watson gave two reasons for his actions. First, Watson considered Home Saving's letter and the attached opinion to be ex parte communications received after the record was closed. Second, Watson did not agree with the opinion.

If Home Saving's letter and the attached opinion are simply ex parte communications, Watson is entirely justified in refusing to consider them. If, however, the Chief Counsel's opinion is analogous to California case law or our own precedential opinions, then Watson should not have ignored the opinion.

James Curry, the Chief Deputy of the Division of Labor Standards Enforcement, testified that hearing officers were expected to follow the guidance provided by the Chief Counsel's opinions. Generally, these opinions were compiled

and distributed during training and later, as more opinions were issued, circulated to the hearing officers.

However, during cross examination, Curry was asked what a hearing officer should do if given a legal opinion by one of the parties. Curry answered that "[t]he hearing officer should check to see that [it]s a letter that has been circulated to the staff for policy guidance." The evidence did not demonstrate that the Chief Counsel's opinion regarding Home Saving's policy had been circulated to the staff. The only copy presented to Watson was the copy submitted by the defendant, Home Savings, after the close of the hearing. Daniel Cornet testified that he did not believe that this opinion had been distributed.

Thus, the Department did not prove that the letter constituted the kind of opinion that hearing officers were required to use as guidance. We can only conclude that this opinion of the Chief Counsel was not the sort of opinion that hearing officers were expected to follow because it had not been circulated.

Watson is also charged with awarding waiting time penalties to Mr. Ward in error. Watson's award of waiting time penalties might be unreasonable if the only basis for the award was Watson's finding that Home Savings did not have a good faith belief in the validity of its policy. The fact

that the Chief Counsel later found the policy unobjectionable should weigh heavily in the good faith determination. However, Watson testified, and the Department failed to refute, that he had an additional basis for awarding the waiting time penalties -- some payments had been delayed.

Thus, the Department failed to prove that Watson intentionally disregarded the law in awarding waiting time penalties. This charge is dismissed.

Burger King

The hearing in Case No. 13-01629, the Burger King case, was held November 15, 1989. The tape of this hearing demonstrates that Watson was hostile and intimidating during the early minutes of the hearing while eliciting basic background information from a defendant's representative, Kurt Pederson. Pederson testified that during this interchange, Watson continuously glared at him. Watson apparently did not understand Pederson's answers and wrote down wrong information on his hearing forms. When the error came to light, Watson acted out his frustration by slamming his briefcase and daily calendar on his desk each time he got out new forms.

During the course of the hearing, despite the fact that both parties were represented, Watson persisted in "educating" the participants, particularly the claimant, on various points of law. After the first day of hearings, defendant's attorney

complained to Watson's supervisor, fearing that defendant could not get a fair hearing because of Watson's apparent bias. Watson was recused.

Watson's behavior constitutes discourtesy to the public based on Watson's infantile behavior of glaring at Mr. Pederson and slamming his brief case in a display of irritation.

Lopez vs. Brent Parker

On November 6, 1989, Watson held a hearing in Case No. 13-01192, Lopez vs. Brent Parker. In the Notice of Adverse Action, Watson was charged with lecturing throughout the hearing and unreasonably refusing to permit a witness to testify. He was also charged with making loud outbursts, being argumentative and using the word, "crap." In this hearing, the only participants were the claimant, a witness called by claimant, and Watson. Watson did not lecture throughout the hearing. Most of the hearing consisted of Watson asking questions and the claimant responding. A witness who accompanied the claimant attempted to clarify the claimant's answers. Watson refused to allow the witness to interrupt his questioning.

Watson's action in refusing to allow the witness to act as interpreter or advocate for the claimant was well within Watson's discretion. Watson's method of silencing the

witness, however, was hostile and rude. At one point, the witness attempted to interrupt and Watson shouted at him. The witness objected to his being treated as a child or as an animal. Watson talked right over the witness' objection and threatened to remove the witness.

The preliminary issue at the hearing was who was claimant's employer, a sub-contractor named Robert or the named defendant, Brent Parker. Parker was served but did not appear. Instead, Parker sent an affidavit stating that he was not the employer; claimant had been hired by a subcontractor.

After hearing claimant's explanations, Watson determined that the appropriate course was to grant claimant a continuance to enable him to add the subcontractor as a codefendant. In response, the witness requested an opportunity to testify. The witness claimed that he had documentary evidence that would determine the identity of the employer. Watson refused to allow him to present this evidence, explaining at length that, if a new defendant was added, the new defendant would be denied the opportunity to cross examine the witness.

Watson clearly did not take the time to understand the import of the witness' claim. If the witness had been able to convince Watson that the correct employer had been named, the matter could proceed.

However, notwithstanding the possibility that a continuance might have been unnecessary if the witness had been allowed to testify and present his evidence, the Board declines to find on these facts that Watson was inefficient. Without more, a mere error of judgement of the type alleged should not be grounds for discipline.

In addition, since the exclamation "crap" is not heard anywhere on the tape recording of this hearing, the Department failed to prove Watson said that word. Watson was, however, discourteous in his treatment of claimant's witness.

England vs. European Fun In The Sun, Inc.

On February 27, 1990, Watson presided over a hearing in Case No. 13-01624, England vs. European Fun In The Sun, Inc.. Early in the hearing, Watson became upset and frustrated, raising his voice when the claimant, who was also upset, refused to affirm that the corporation, rather than the individual owners of the corporation, was his employer. Watson repeatedly asked the same questions and the claimant repeatedly gave the same answers. The claimant was himself belligerent and hostile. When the claimant attempted to explain, Watson interrupted him, again asking the same unproductive questions. The interchange appeared to be a contest of wills. At one point, Watson was so upset that he left the room, stating that he was going to obtain his senior.

After this break, Watson returned and managed, for the most part, to restrain himself from further outbreaks.

Watson is charged with interrupting the claimant when he attempted to respond to Watson's questions. This happened numerous times during the hearing when the claimant attempted to explain his answers. Watson cut off claimant denying him an opportunity to explain.

Any delay caused by Watson's absence to obtain the counsel of his senior is mitigated by the fact that leaving the room until he could regain control was in accord with one of the suggestions made at an earlier performance evaluation. However, Watson's argumentative and repetitious questions constitute discourtesy and inefficiency.

Part B

Part B of the Notice of Adverse Action alleges that Watson's hearings were inordinately long and that he scheduled continuances even though it was possible to proceed with the hearing. A review of the taped hearings indicates that Watson's hearings were inordinately long primarily because Watson failed to ask simple questions designed to elicit information and instead asked verbose, confusing questions designed only to demonstrate Watson's expertise in this area of the law. An outcome of Watson's failure to conduct his

hearings efficiently was the need to continue the hearings until another day.

The Department also charged that, despite having been warned against granting unnecessary continuances, Watson continued his practice of granting continuances when he should have proceeded. The Department quantified this charge by presenting evidence that in the three month period before Watson's termination, he had granted 24 continuances, while his predecessor granted only 2 within a similar period of time. Even without information measuring the appropriateness of the individual continuances, the large disparity in the number of continuances granted by Watson when compared with the practice of his predecessor supports a finding that Watson granted an excessive number of continuances despite having been warned against this practice.

The Department presented evidence of one specific case where Watson continued the hearing when the Department believed he should proceed as scheduled. In Mott vs. Lotus Management, Inc., a hearing held sometime before October 23, 1989, Mrs. Mott filed a claim for wages for herself and her husband. Wife and husband were employed by the same employer. Watson required that the claim be amended to distinguish the individual claims and then continued the hearing although it was possible to hear Mrs. Mott's claim.

Watson testified that his rationale for continuing the claim rather than hearing it at that time was that Mrs. Mott was unprepared to proceed and if he had heard her claim she would have recovered nothing. Notwithstanding Watson's claimed rationale, it is the Department's policy to proceed when possible.[2]

Unnecessary continuing of cases that should be heard or completed as scheduled constitutes inefficiency.

Part C

Part C of the Notice of Adverse Action was divided into two parts at the hearing. The first charge in Part C alleges that Watson failed to follow his supervisor's instructions and then attempted to circumvent those instructions by ignoring the chain of command. The instructions in question concern the use of a long form versus a short form in preparing decisions. On December 13, 1988, the Labor Commissioner issued a memorandum instructing the hearing officers to utilize a short form for decisions in which the award, including penalties, did not exceed $2,000.00.

In August 1989, Watson issued a decision in which the award, with interest, exceeded $2,000.00. When Watson's

[2]Of interest is the fact that Mrs. Mott's son became ill during the time she had been granted to amend her claim. She called for an extension but was refused. When Mrs. Mott failed to appear on the appointed day, Watson dismissed her claim with prejudice.

supervisor, Daniel Cornet, became aware that Watson had used the short form of decision, he instructed Watson to use the long form. Watson challenged Cornet's instruction, maintaining that interest should not be included in the calculation of the award for purposes of determining which form to use, long or short. Cornet agreed to check with Regional Office. Cornet confirmed that the long form should be used and informed Watson of his findings. Watson still thought Cornet's finding to be in error and telephoned Lloyd Aubry, the Labor Commissioner, directly.

Watson is charged with failing to follow his supervisor's instructions and attempting to circumvent those instructions by directly contacting the State Labor Commissioner and/or the Regional Manager. This charge is dismissed. Watson did not fail to follow his supervisor's instructions: he filed the long form. In addition, there was no evidence of any policy stating that only specific channels could be used to ask for information. Although the memorandum to the hearing officers instructed them to contact their supervisor if they had questions, this instruction did not expressly preclude the hearing officers from seeking help from others.

The second charge in Part C alleges that Watson was belligerent and hostile when ordered to conduct a hearing in the case of Satringer and Garcia vs. Coyote Kilns, Case No.

13-02520. On May 11, 1990, a claimant approached Cornet to complain that Watson had taken her hearing off calendar and she was going out of the country. Cornet contacted Watson and was informed by him that he had continued the hearing because of improper service on the defendant, Coyote Kilns.

At the hearing before the ALJ, Cornet testified that hearings are often conducted even though there is a question about whether service has been made on the defendant. Because an interpreter was present and one of the claimants was about to leave the country, Cornet instructed Watson to conduct the hearing. Cornet informed Watson that a provisional hearing could be held and described how to conduct such a hearing. Watson objected, loudly disagreeing about the propriety of conducting the hearing when notice had not been perfected. Watson told Cornet, "you do it."

Shortly thereafter, Watson telephoned Bob Smith, Cornet's supervisor. After speaking with Smith, Watson entered Cornet's office and informed him that Smith wished to talk to him. After a brief three-way conference call, Smith instructed Watson to hold the hearing, stating that Watson had not informed him of the entire circumstances. Watson told Smith that if he had to conduct the hearing, then he was doing so under protest.

Watson testified that he refused to conduct the hearing, after Cornet had instructed him to do so, because he believed it was a violation of his oath of office and against respondent's policy to protect both parties. He denied telling Cornet, "you do it." He testified that in refusing, he stated, "If you want it, you should hold it - I'm not refusing but protesting."

The ALJ who heard the testimony of the witnesses found Cornet's version to be the more credible. Although Watson ultimately conducted the hearing, his initial refusal and belligerence constitute insubordination. [3]

Summary of Findings and Charges

To summarize, the record supports overwhelmingly a finding that Watson was discourteous to the public. During his hearings, Watson was rude and abrasive, often badgering and belittling people who appeared before him. Watson's treatment of defendant Butson, claimants Staub and England, and the witnesses in Lopez and Brockway are good examples of the hostility a hearing participant was likely to face during Watson's hearings. Slamming his briefcase and glaring at

[3]Watson was also charged with misconduct in the case of Rajkovich vs. Certified Pension Consultants. The tape recording of this hearing is not among the numerous tapes contained in the record. Given the time it would take to secure a copy of this recording and the fact that Watson's dismissal is well supported by other evidence in the record, the Board makes no ruling on this charge.

defendant's representative as Watson was found to do in Burger King is another example of Watson's discourtesy.

Watson is guilty as charged of inefficiency for delaying the influx of testimony by his longwinded lecturing as examined in Kinney and Saddler, and for stubbornly asking repetitive unproductive questions as illustrated in the England case. Watson is also guilty of inefficiency for unjustifiably granting continuances despite the Department's clear instructions that he avoid granting unnecessary continuances.

Watson is also guilty of inexcusable neglect of duty for his conduct in Kinney where he failed to insure that both sides would have an opportunity to develop a complete record. Watson failed to recognize that it was his job to conduct a hearing and not an inquisition.

Watson is guilty of insubordination for his belligerent and hostile attitude when ordered by his supervisor to conduct a hearing in the Coyote Kiln case. Watson's unprofessional conduct during the Staub case which caused Staub to be deprived of his opportunity for a hearing constitutes other failure of good behavior.

Having found that the bulk of the charges against Watson have been proven by a preponderance of the evidence, the issue remains whether the Department followed the principles of

progressive discipline in dismissing Watson from his position as a Deputy Labor Commissioner II.

Penalty

Pursuant to Government Code section 19582, the Board is charged with determining whether a disciplinary action is "just and proper". In accomplishing this responsibility, the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194:

> ... [W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, [h]arm to the public service. Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. 15 Cal. 3d 217-218.

In this case, the harm to the public service is serious. Persons forced to appear in an administrative proceeding should not be subjected to abuse. Since Watson's duties as a Deputy Commissioner II consist almost entirely of conducting hearings in which the public must appear, any repetition of this behavior is certain to result in additional harm.

One of the issues the Board considers in analyzing the circumstances surrounding an employee's conduct is whether the employer has followed the principles of progressive

discipline. The issue of progressive discipline has been visited numerous times over the years. In Rita Nelson (1992) SPB Decision 92-07 p. 6, we stated:

> Historically, the SPB has followed the principles of progressive discipline in exercising its constitutional authority to review disciplinary actions under the State Civil Service Act. The principles of progressive discipline require that an employer, seeking to discipline an employee for poor work performance, follow a sequence of warnings or lesser disciplinary actions before imposing the ultimate penalty of dismissal. The obvious purpose of progressive discipline is to provide the employee with an opportunity to learn from prior mistakes and to take steps to improve his or her performance on the job. Thus, corrective and/or disciplinary action should be taken by a department on a timely basis: performance problems should not be allowed to accumulate before progressive discipline is initiated.

Although formal discipline is preferred as a means of informing an employee that improvement is needed, formal discipline is not always required prior to the imposition of harsh discipline. [See Mercedes C. Manayou (1993) SPB Dec. 93-14 p. 11.] Informal discipline may suffice as long as the employee is provided with an opportunity to learn from prior mistakes and to take steps to improve his or her performance on the job prior to the imposition of harsh discipline. [Id.] Although the Department, failed to take formal adverse action against Watson prior to imposing the ultimate sanction of dismissal, the main principles of progressive discipline were followed. Over the years, Watson was informed that his supervisors had serious concerns about the manner in which he

conducted hearings. Through performance evaluations, counseling sessions and written memoranda, these concerns were fully shared with Watson. After each evaluation and discussion, Watson agreed to change his ways but then the complaints began again.

Over the course of 1989, Cornet gradually became aware of complaints, many of which he shared with Watson. Finally, in October of 1989, Cornet met formally with Watson and his representative. Watson was informed of the basis of the proposed adverse action. It is important to note that even after being notified that the Department was preparing to take serious disciplinary measures, Watson's discourtesy continued, as is evidenced by his conduct in the Burger King, England and Lopez cases.

Through progressive discipline, an employee is informed of the need for improvement and given the opportunity to improve his or her behavior. Watson's continued rudeness, as evidenced by his behavior after adverse action was recommended, indicates that he lacks the capacity to correct his problems.

We are seriously concerned with the likelihood of recurrence of Watson's misconduct in the future. Prior to recommending adverse action, Watson's supervisor suggested

that Watson contact the Employee Assistance Program. Watson responded that such contact was unnecessary.

During the hearing before the ALJ, the Watson was asked if he considered any of his conduct to be badgering, rude or hostile. Watson denied these descriptions of his behavior. Watson denied any wrongdoing at all. He blamed the witnesses for not answering his questions and the attorneys for wasting his time.

If, after hearing the testimony of the witnesses and hearing the tapes of his hearings, Watson does not understand why he is being disciplined, we are convinced that he will not cease his misconduct and, thus, should no longer conduct hearings on behalf of the department.

Mindful that Watson is a twenty year employee, the Board reviewed alternatives to dismissal. The Department maintains that dismissal is the only appropriate course of action because Watson's main problem is in relating to people, and the Department has no positions that do not involve public contact. The Deputy Labor Commissioner I positions involve public contact where the need for sensitivity and tact with people is more important than that of a hearing officer. One of the primary functions of the Deputy Commissioner I is to compromise and settle cases. Therefore, it would be inappropriate to demote Watson to that level.

(Watson continued - Page 34)

CONCLUSION

Watson's misconduct toward the parties during his hearings constituted inefficiency, inexcusable neglect of duty, discourteous treatment of the public and other failure of good behavior within the meaning of Government Code section 19572, subdivisions (c), (d), (m) and (t). His lengthy lecturing and scheduling of unnecessary continuances constituted inefficiency within the meaning of Section 19572, subdivision (c). Watson is also guilty of insubordination, Section 19572, subdivision (e), for belligerently challenging his supervisor's instructions and initially refusing to follow them.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The above-referenced action of the Department in dismissing Watson is sustained;

2. Appellant, Robert J. Watson, is dismissed.

3. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

(Watson continued - Page 35)

THE STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Lorrie Ward, Member
Floss Bos, Member

* Member Alfred R. Villalobos did not participate in this decision.

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 8, 1994.

GLORIA HARMON
Executive Officer
State Personnel Board